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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KRISTEN M. WILLIAMS et al.,

Plaintiffs, Cross-defendants and Appellants,

v.

GARY K. ZERLIN,

Defendant, Cross-complainant and Appellant,

GARY K. ZERLIN et al.,

Defendants, Cross-complainants and Respondents.

2d Civil No. B230300
(Super. Ct. No. 1306795)
(Santa Barbara County)

Adjacent property owners dispute the existence of an easement for ingress and egress over appellants' property. Appellants assert that the easement was extinguished by adverse possession. After a bench trial, the court granted declaratory and injunctive relief and quieted title to the easement in favor of respondents and cross-complainants finding that appellants had not established that their use of the easement was hostile. Therefore, appellants did not acquire the easement by adverse possession.

Appellants assert the trial court erred because the evidence establishes adverse possession. They also assert various procedural errors.

One of the respondents appeals the amount of expert witness fees awarded by the trial court pursuant to Code of Civil Procedure section 998. We affirm the judgment for declaratory and injunctive relief and quieting title in favor of respondents and affirm the order granting expert witness fees.

*STATEMENT OF FACTS AND PROCEDURAL HISTORY*

Appellants Matthew and Kristen Williams (collectively Williams) own a flag lot on Sea Ranch Drive in Santa Barbara. The Williams' lot includes a 40-foot by 300-foot strip of land running from the southern boundary of their lot to Sea Ranch Drive (the driveway). Respondents Gary Zerlin and James Vanyo own adjoining lots south of and adjacent to Williams' parcel. The driveway is bounded on the east and west by the Zerlin and Vanyo lots. Both Zerlin and Vanyo's lots have frontage on Sea Ranch Drive. The three parcels were created by subdivision in the early 1970's. The grant deeds to the original purchasers of the Zerlin and Vanyo lots contained an easement for ingress and egress over the driveway (the Zerlin/Vanyo easement). The easements location and extent of the easements were described by reference to a recorded subdivision map.

The parcels changed hands through the years. Vanyo purchased his lot in 1974. Williams purchased their lot in 2000. Zerlin purchased his lot in 2009, from Mr. and Mrs. Klinger. The Klingers had purchased the lot in 2001. No dispute concerning the existence or use of the easement arose until 2003 when Williams repaved the driveway enlarging it from approximately 10-12 feet to approximately 40 feet in width, enclosed it with a six-foot high wrought iron fence and installed vehicular gates at both the northern and southern ends. He also installed pedestrian gates on the south, east and west sides of the driveway.

Williams filed a complaint for declaratory relief and quiet title on April 17, 2009, after Vanyo refused to quitclaim his easement rights to Williams. The complaint alleged that the Zerlin/Vanyo easement was extinguished by adverse possession. Both

Zerlin and Vanyo filed an answer and cross-complaint for declaratory relief, quiet title and injunction.

In or about April 2010, Williams began filing complaints with the City fire department about fire hazards on the Zerlin and Vanyo properties. From about June or July 2010, Williams began blocking access to the easement by planting shrubs, installing additional fencing and parking cars in the easement.

After Zerlin received a notice from the City to remove vegetation from his lot or be subject to citation, Zerlin filed a motion for preliminary injunction prohibiting Williams from interfering with Zerlin's use of the easement area outside the fence and gates to permit weed abatement on his property. On August 17, 2010, the trial court issued a preliminary injunction permitting Zerlin to remove the vegetation and fencing (other than the iron fencing) if Williams failed to do so.

Zerlin and Vanyo made several offers to compromise pursuant to Code of Civil Procedure section 998. None of them were accepted by Williams and the case was tried by the court. After eight days of testimony, the court issued a statement of decision awarding declaratory relief and quieting title to the easement in favor of Zerlin and Vanyo, finding that Williams had not established the Zerlin/Vanyo easement was extinguished by adverse possession because the evidence failed to show hostile use of the easement by Williams. The judgment also restrained and enjoined Williams from interfering with the use of the easement by Zerlin and Vanyo. In addition, the judgment permitted Zerlin and Vanyo to remove (1) the southerly vehicular access gates and pedestrian gate, (2) the gates and fences on the east and west boundaries of the easements, and (3) plants, shrubs, landscaping, berms and other obstructions on or around the east and west boundaries of the easement which blocked reasonable access for ingress and egress by Zerlin and Vanyo if Williams did not do so within 45 days of the date of the judgment. The judgment also prohibited Williams from installing landscaping or other types of improvements which hindered, blocked or interfered with Zerlin and Vanyo's rights to reasonable ingress and egress over the easement.

Williams filed a petition for writ of supersedeas with this court on January 5, 2011. On March 23, 2011, we granted the petition and stayed enforcement of the judgment.

On appeal, Williams asserts that the Zerlin/Vanyo easement was extinguished or partially extinguished by adverse possession, the court erred in ordering removal of the vehicular gates and fences without an analysis of "unreasonable interference," the judgment is inconsistent with the statement of decision, and the trial court entered judgment without providing Williams the statutory period to object.

## *DISCUSSION*

### *A. Williams Appeal*

#### *1. Adverse Possession*

"'In an action to quiet title based on adverse possession the burden is upon the claimant to prove every necessary element: (1) Possession must be by actual possession under such circumstances as to constitute reasonable notice to the owner. (2) It must be hostile to the owner's title. (3) The holder must claim the property as his own under either color of title or claim of right. (4) Possession must be continuous and uninterrupted for five years. (5) The holder must pay all the taxes levied and assessed upon the property during the period. [Citations.]'" (*Preciado v. Wilde* (2006) 139 Cal.App.4th 321, 325.)

To establish adverse possession, a claimant is required to show "acts of ownership which proclaim to the world, and bring notice to the owner, that a right is claimed in the land over which the claimant is seeking to exercise dominion." (*West v. Evans* (1946) 29 Cal.2d 414, 417.) "'[A]n easement cannot be acquired or extinguished by adverse use unless the party whose rights are affected thereby has knowledge of the adverse nature of such use. This knowledge may be either actual or constructive, resulting from notice either express or implied.'" (*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 903.)

At trial the following evidence was adduced:[1]

*Testimony of Kelly Moore*

Moore is a good friend of Williams. He helped Williams install the gates and fences in 2003. During the three-month period he worked on the property, he did not observe Vanyo or any other neighbor on the easement. He placed a common master key lock on the pedestrian gates after he installed them. Subsequently, he noticed that the pedestrian gate on the property line between the Williams and Zerlin lots was unlocked. Williams told Moore that he was constructing the fence and gates because he wanted to keep his dogs in his property. Moore joked that "this must be the most expensive dog run in the County of Santa Barbara." He did not observe any "no trespassing" signs on either the east or west gate from 2003-2010.

*Testimony of Matt Williams*

Williams spoke to Vanyo on two occasions. Vanyo told him he was not paying maintenance fees for and was not interested in using the driveway. Williams did not speak to Mr. or Mrs. Klinger, the prior owners of the Zerlin lot, at any time regarding the easement.

Neither Vanyo nor Klinger spoke to him about access through the vehicular gate and neither of them asked him for the security code for the gate. After installation of the gates and fence, he never observed Vanyo or Klinger operating a vehicle on the driveway. The reasons he constructed the gates and fence were for privacy, aesthetics and security, to give his dogs a safe place to roam, and to define his property lines.

On May 10, 2009, Williams opened the vehicular gate at the south end of the driveway and removed the locks from the pedestrian gates because he anticipated he might be evacuated because of the Jesusita fire. The gates were closed the following day.

The construction of the gates and fence was finished on August 31, 2003, and his adverse possession claim commenced on that date. Williams installed the

[1] We consider the evidence most favorable to Zerlin and Vanyo under the rule that a judgment is presumed correct, and all presumptions must be indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

pedestrian gates to permit him access to the other side to do maintenance on the fence and property. The gates were locked at all times, but he did not have photographic evidence showing locks on the gates prior to May 9, 2009. He installed "no trespassing" signs on his property in 2003, but had no photographic evidence of any signs prior to May 9, 2009.

Williams never observed Klinger using the pedestrian gate and did not learn from any source that Klinger or Vanyo used any portion of the driveway for any purpose at any time he owned his property. He did not give either Vanyo or Zerlin permission to use the driveway. If they had asked for the security code to the vehicular gate, he would have refused. Between 2003 through 2009 he was not trying to claim ownership of the easement to the exclusion of Vanyo and Klinger/Zerlin.

*Testimony of Kristin Williams*

She testified that she became aware that Vanyo had an easement on their property around the time they purchased the property. She did not learn that Zerlin had an easement until 2009. In a conversation with Zerlin in 2009, she asked if he would give up the easement, but he declined. After the pedestrian gates were installed in 2003, they were locked at all times, but she could not recall the dates the locks were put on the gates. She also did not know when the "no trespassing" signs were installed. She never told Vanyo or Klinger not to use the easement. She never observed Klinger or Vanyo on the driveway.

*Deposition of Dr. James Vanyo*[2]

He drove up the easement in 1974 when he bought the property. After the fence and gates were installed, he used the pedestrian gate near his property for access to the easement to view his property for maintenance and weed abatement. He had no problem with Williams installing the gates and fence. Williams told him that he could have the code for the vehicular gate anytime he wanted it.

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[2] Dr. Vanyo died prior to trial and his deposition testimony was read during the trial.

When he purchased his lot, it was vacant. His residence was built in 1977. He built a driveway on the east side of his property and paved it. He did not recall whether Klinger ever drove on the easement. The first time he saw locks on the pedestrian gates was on May 22, 2009.

*Testimony of Dr. Gary Zerlin*

He acquired title to his property on April 14, 2009. He was aware of the easement at the time of purchase. After escrow closed, he learned that his easement rights were being challenged. He walked the property at least three times before escrow closed. He did not notice any no trespassing signs on the fence or locks on any of the pedestrian gates. After close of escrow, he walked the property again at the end of April 2009. He did not see any locks on the gates. The first time he saw locks on the gates was in May 2009.

The northeast part of his lot is covered with brush. Only a four-wheel drive vehicle could drive on that part of the lot. Not having easement rights over the driveway lowered the value of his property because he did not have full access to his lot to perform maintenance.

He was not provided with the code to enter the vehicular gate. He assumed he would contact Williams to gain access. He did not question his right to use the easement because it was contained in his grant deed. Neither he nor his wife had ever driven or walked inside the fenced area enclosing the driveway. He talked to Vanyo after close of escrow. Vanyo told him that the west pedestrian gate was installed for the benefit of the prior owners of his lot.

*Testimony of Kenneth James Wilson*

He is a licensed surveyor. He surveyed the boundaries of the driveway. The northerly portion of the fence encroaches about four inches onto the Vanyo property. At the southern end of the driveway, near Sea Ranch Drive, the fence is on the Williams property. The fence is on the Zerlin property from halfway up the easement to its northern border. The encroachment varies from three to five inches.

*Testimony of Chris Klinger*

Klinger is the prior owner of the Zerlin lot. He acquired the lot in 2001 and began residing there in 2004. When he returned to the property in 2004, he was shocked and angry when he saw the gate and fences. He did not take any action at that time because he believed he had easement rights over the driveway contained in his deed. He believed Williams was obligated to give him access to the easement.

He had a discussion with Matt Williams in the summer of 2004. They met at the west pedestrian gate. Williams told him the fence was for a dog run. Williams did not tell him the fence was to keep him out. He assumed the easement was available for his use. In 2004 or 2005, he spoke to Kristin Williams. He told her that he might want to use the easement to connect with his driveway. He did not make use of the easement at that time because he could not afford the project. Mrs. Williams told him that he would be responsible for half the maintenance on the driveway if he did go forward with the project.

He did not see no trespassing signs or locks on the gates from 2004 through 2009. During that time, he did not believe Williams was trying to take away his easement rights. He used the west pedestrian gate on three occasions in 2008 or 2009 to retrieve his animals. He used the easement between 2004 and 2009 to do weed abatement on his property. He did not have the code to open the vehicular gate but assumed he would have access if he requested it.

*Testimony of Rick Hoffman*

He is an engineering geologist for the County of Santa Barbara. He reviewed three alternative access corridors—the existing driveway, an alternative along the eastern edge of the Zerlin lot, and an alternative through the Vanyo property. He found all of them geologically suitable. However, because of the terrain of the property, extensive grading would need to be done at considerable expense to develop alternatives to the existing driveway.

*2. Substantial Evidence Supports Trial Court's Finding of No Hostile Use*

The trial court issued a very detailed 52-page statement of decision. The court found that the testimony of Klinger, Zerlin and Vanyo was more credible than that of Williams concerning the nonexistence of no trespassing signs and locks on the gates prior to May 2009. From this evidence, the court found that Williams had not established hostile use of the easement for five years sufficient to establish adverse possession.

The trial court correctly concluded that the enclosure of the easement with gates and fences without more is insufficient to establish adverse possession. (See, e.g., *Clark v. Redlich* (1957) 147 Cal.App.2d 500, 507 ["under the circumstances of this case, whether the fencing and cultivation of the servient estate constituted acts of adverse possession was a question of fact"].) Klinger, Zerlin and Vanyo testified that, until May 2009, when Williams placed locks on the pedestrian gates and no trespassing signs on the fences, they thought, based on conversations with Williams, that the fence and gates were to enclose a dog run. Williams' intent to build a dog run was reiterated by a close friend of Williams who helped in building the fence. The trial court could reasonably conclude that Zerlin and Vanyo had no notice that the fences and gates were an attempt by Williams to extinguish their easements by adverse possession. (See *Clark*, at p. 508 ["Although certain uses of a servient tenement by their very nature may constitute notice of an adverse claim, [citation] other uses thereof may appear to be only the reasonable exercise of proprietary rights, and would not be the basis for an implication of such notice"].)

Whether the elements of adverse possession have been met is a question of fact. (*Sevier v. Locher* (1990) 222 Cal.App.3d 1082, 1087.) Where, as here, conflicting evidence was submitted and the court based its decision on the credibility of witnesses, we are powerless to reverse that decision. As we stated in *Preciado v. Wilde*, *supra*, 139 Cal.App.4th at pages 326-327: "'In a quiet title action the plaintiff must prove his title in order to recover.' [Citation.] . . . [¶] [Plaintiffs] did not bear their burden of proof

concerning their claims of title or color of title. Triers of facts exclusively decide the credibility of witnesses."

Williams asserts that a partial extinguishment of the easement by adverse possession occurred because there was no testimony that anyone other than Williams used the easement for vehicular purposes. The assertion is without merit. "[A]n easement created by grant is not lost by mere nonuse, no matter how long . . . ." (*Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1384.) Zerlin and Vanyo acquired their easements by express grant. The easement was for ingress and egress. There is no language of limitation in the grant that ingress and egress was limited to pedestrian access. Substantial evidence supports the trial court's decision that the easements were not extinguished by adverse possession.[3]

*3. Adequacy of Statement of Decision and Consistency with Judgment*

Williams challenges the adequacy of the statement of decision, arguing that it does not contain findings that the fence and gates constituted "unreasonable interference" with use of the easement by Zerlin and Vanyo and, thus, permitting removal of the fences and vehicular gate was error. We review this claim of error under an abuse of discretion standard. (*Hernandez v. City of Encinitas* (1994) 28 Cal.App.4th 1048, 1077-1079.)

Code of Civil Procedure section 632 requires a trial court to issue a statement of decision explaining the factual and legal basis for its decision upon the request of any party appearing at trial. The statute provides in relevant part: "The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial."

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**3** Williams' argument that the description of the easement is ambiguous and thus "a floating easement" is without merit. The grant deed described the easement by reference to a recorded subdivision map. That map clearly sets forth the boundaries of the easements granted to Vanyo and Zerlin. (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 1001; *McCullough v. Olds* (1895) 108 Cal. 529, 532.)

"In rendering a statement of decision under Code of Civil Procedure section 632, a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court's determination would reversible error result. [Citations.] Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings. [Citation.]" (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.)

The trial court issued a detailed statement of decision that sets forth the factual and legal bases for its rulings. The trial court was not obliged to address every question raised by defendants in their request for a statement of decision, nor was the court obligated to make an express finding of fact on every disputed factual matter. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 763.) The court's refusal to do so does not render the decision inadequate. (*Hellman v. La Cumbre Golf & Country Club*, *supra*, 6 Cal.App.4th at p. 1230.)

Moreover, the statement of decision does contain findings supporting removal of the vehicular gate and fences, as follows: "Balancing of Hardships [¶] 38. The prejudice to Vanyo and Zerlin by terminating the easements does significantly outweigh any prejudice to the Williams by allowing Vanyo and Zerlin access. [¶] 39. The topography of the Vanyo and/or Zerlin properties does render it significantly difficult to access the Northern portions of their respective properties without the use of the easement. [¶] 40. The costs and burdens associated with the development of alternative driveways to the Northern portions of the Vanyo and Zerlin properties do outweigh the costs and burdens placed upon the Williams' property by allowing access over the existing easements."

The judgment states in relevant part: "This Court further finds and determines that both Vanyo and Zerlin are entitled to have the landscaping, gates and fences removed so that Zerlin and/or Vanyo and their respective assigns, transferees and

heirs will have reasonable access for ingress and egress to the Vanyo Property and/or the Zerlin Property."

The statement of decision complies with section 632 and is consistent with the judgment.

*4. Lack of Opportunity to Object to Proposed Judgment*

Prior to the conclusion of trial, the court requested that the parties submit questions to be addressed in the court's statement of decision. The parties did so on November 30, 2010. After trial concluded, the court issued a tentative decision on December 7, 2010. The court requested that Zerlin's counsel prepare a proposed judgment. Counsel submitted a proposed judgment on December 13, 2010. Thereafter, Williams hired a new attorney who filed a document entitled "Request for Statement of Decision and Proposals Re: Tentative Decision" containing a request for findings of fact and conclusions of law on 48 controverted issues and three "Proposals for Matters Not Included in Tentative Decision." The court denied the request and issued its statement of decision on December 22, 2010. On December 22, 2010, Williams filed objections to the proposed judgment. On December 28, 2010, Zerlin's counsel lodged a proposed judgment after trial. On January 4, 2011, Zerlin's counsel lodged yet another proposed judgment after trial. Williams filed objections to the proposed judgment and execution of the proposed judgment on January 5, 2011. On that date, the court filed its judgment after trial.

Williams asserts the trial court erred because it filed its judgment without permitting Williams 10 days to object to the proposed judgment pursuant to California Rules of Court, rule 3.1590(j). The contention is without merit. The above chronology shows that Williams had ample opportunity to, and did, object to the December 13 proposed judgment. The differences between the December 13, 2010, and the January 4, 2011, proposed judgment are minor. The December 13 proposed judgment states that "Vanyo and/or Zerlin have the right to and may remove and dispose of all the gates, fences and *obstructions on or around the East and West boundaries of the Zerlin/Vanyo Easements which obstruct, block or hinder Vanyo's and/or Zerlins' reasonable access to*

*the Zerlin/Vanyo Easements for the benefit of the Vanyo Property and/or the Zerlin Property."* (Italics added.) The January 4 proposed judgment identifies the "obstructions" of which the court permitted removal in the December 13 proposed judgment, i.e., "plants, shrubs, landscaping, asphalt/concrete berms" and those whose removal are excepted from the injunction, i.e., "a) the drainage swale near Sea Ranch Drive; b) the trash/electrical enclosure also near Sea Ranch Drive; and c) the decorative block and mailbox structures which abut and/or are near Sea Ranch Drive." The January 4 proposed judgment also prohibits Williams from obstructing or interfering with use of the easement by Zerlin and Vanyo in the future. These additional terms in the January 4 judgment are minor and merely explanatory of the term of the phrase "obstructions . . . which obstruct, block or hinder . . . reasonable access" in the December 13 judgment. Moreover, a court granting equitable relief has the power to award additional relief to afford complete relief to the parties. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 901.)

*B. Zerlin Appeal*

Zerlin requested $80,679.80 for expert witness fees and other costs incurred in the action pursuant to Code of Civil Procedure section 998, subdivision (c). The trial court awarded fees in the amount of $18,320.35. The trial court reduced the amount of expert witness fees finding that Zerlin was both a defendant and a cross-complainant. As a cross-complainant, Zerlin's entitlement to expert witness fees was limited to those incurred after the date of his last offer to compromise. The court was aware, however, that it could award expert witness fees incurred by Zerlin as a defendant whether incurred before or after the making of the offer to compromise. (*Id*. subd. (c)(1); *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 532.)

*1. Code of Civil Procedure Section 998 and Expert Witness Fees*

"Code of Civil Procedure section 998 is designed to encourage the settlement of lawsuits before trial. (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280.) Pursuant to section 998, '[n]ot less than 10 days prior to commencement of trial or arbitration,' a party in a case 'may serve an offer in writing upon any other party to

the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time.' (Code Civ. Proc., § 998, subd. (b).) If the party to whom the offer is extended accepts the offer, it is filed with the clerk and judgment is entered accordingly. (*Id.*, subd. (b)(1).) On the other hand, as pertinent here, 'If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.' (*Id.*, subd. (c)(1).) Furthermore, 'If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs.' (*Id.*, subd. (d).)" (*Regency Outdoor Advertising, Inc. v. City of Los Angeles*, *supra*, 39 Cal.4th at pp. 528-529.)

*2. Zerlin's Offers to Compromise*[4]

During the pendency of the litigation Zerlin made five offers to compromise pursuant to section 998. None were accepted. In the first offer, made on February 2, 2010, Zerlin agreed to pay a prorata portion of easement maintenance fees pursuant to Civil Code section 845 if Williams gave him keys to unlock the gates.

In the second offer made on February 11, 2010 (first amended offer to compromise), Zerlin wanted to retain easement areas outside the easterly, westerly and

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[4] Only Zerlin appealed the award of expert witness fees.

southerly fences and gates. This offer was followed by a "second amended offer to compromise" on March 5, 2010, and a third amended offer to compromise was made on April 30, 2010. The court found these offers to be ambiguous and unenforceable.

A fourth offer to compromise was made on October 12, 2010, in which Zerlin offered to relinquish certain portions of the easement as shown on a map. The trial court found the fourth offer to compromise reasonable and unambiguous.

The trial court's judgment in favor of Zerlin awarding him all the relief he requested in his cross-complaint was unquestionably more favorable than any of Zerlin's offers to compromise that were rejected by Williams.

*3. The Trial Court's Expert Witness Fee Award*

The court exercised its discretion in choosing to limit the award of expert witness fees to those incurred after the October 12, 2010, offer to compromise. The court reasoned: "If Zerlins were merely defendants, the question of whether to limit recovery of expert witness fees to pre-offer fees would be academic. The second sentence of CCP § 998(c)(1) does not include the limitation in the first sentence—that the plaintiff 'shall pay the defendant's costs from the time of the offer.' The California Supreme Court has held that, when the Legislature amended the statute in 1997 and deleted from the second sentence of (c)(1) the language 'allowing the discretionary award of costs "from the date of filing of the complaint,"' it did not intend to limit defendants to post-offer expert witness fees. Had the Legislature so intended, 'it would have said so more clearly, rather than retain language that defined the scope of allowable expert fees by their connection to trial.' (*Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 39 Cal.4th 507, 533 (2006).) Therefore, when a plaintiff rejects a defendant's offer, the plaintiff is at risk of a discretionary award of all expert witness fees, not just those incurred after the offer.

"But Zerlins are also 'plaintiffs' in the context of their cross-complaint. (See CCP § 426.10(b).) When a plaintiff's CCP § 998 offer is not accepted and the defendant fails to achieve a better result at trial, the court 'may require the defendant to pay a reasonable sum to cover *postoffer costs* of the services of expert witnesses. . . . ' (CCP § 998(d) [italics added].)

"The court has discretion to award no expert witness fees. Necessarily, it also has discretion to limit the amount of expert witness fees. Because of Zerlins' dual role as both defendants and plaintiffs, the court will exercise its discretion to limit the amount of expert witness fees to pre-offer fees. Indeed, the briefing of the parties indicates that they anticipate that approach."

*4. The Trial Court Had Discretion to Limit the Fee Award*

Whether a defendant should be awarded expert witness fees and the amount of those fees are matters within the discretion of the trial court. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 54-55.) The trial court understood that it could have assessed all of the expert witness fees claimed by Zerlin as a defendant, or a lesser sum if it chose to view Zerlin as a plaintiff prevailing on its cross-complaint. With these variables in mind, it chose to limit the award to those expert witness fees incurred after the filing of the last statutory offer to compromise. Limiting the amount of fees to those incurred after the last offer to compromise is not an abuse of discretion. (See, e.g., *Palmer v. Schindler Elevator Corp.* (2003) 108 Cal.App.4th 154, 157 [prior settlement offer is extinguished by subsequent settlement offer to the same party].)

Williams' argument that the cost-shifting provisions of section 998 apply only in cases involving monetary relief is without merit. Our decision in *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, is instructive. In that case we applied section 998 in a case involving no money damages but seeking, as here, equitable relief and quieting title to an easement. The trial court quieted title to an equitable easement in favor of defendants.

In addressing the defendants' entitlement to expert witness fees pursuant to section 998, we said: "[S]ection 998 provides a sanction against the rejecting offeree unless the offeree obtains a more favorable judgment than the offer. The question therefore is not whether the [defendants] as offerors obtained a more favorable judgment than their offer. Instead, the question is whether [plaintiff] as the rejecting offeree

obtained a judgment more favorable than the offer." (*Linthicum v. Butterfield*, *supra*, 175 Cal.App.4th at p. 270.)

*DISPOSITION*

The judgment for declaratory and injunctive relief and quieting title in favor of respondents is affirmed. The order granting expert witness fees to Zerlin is affirmed. The stay is dissolved. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

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Miller Starr Regalia, Kenneth R. Styles and Brian D. Shaffer for Appellants Williams.

Hall & Bailey, John L. Bailey and Shannon Duane for Respondents Zerlin et al., and Appellant Gary K. Zerlin.

McCarthy & Kroes and R. Chris Kroes for Respondent Vanyo.